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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1652, *ET AL.*

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

vs.

SHELL OIL COMPANY, *ET AL.,*
Respondents

On A Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS IN SUPPORT OF PETITIONERS

FREDERICK MORING
1100 Connecticut Ave. NW
Washington, DC 20036
Counsel for Amicus Curiae

Of Counsel:
JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, NW
Washington, DC 20036

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QUESTION PRESENTED

Whether the "production or gathering" exemption of Section 1(b) of the National Gas Act renders the Federal Energy Regulatory Commission powerless to prescribe or enforce delivery standards under which the certificates or licenses issued to gas producer-sellers are to be exercised.

INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD)[1] is an unincorporated organization comprising gas distribution companies serving over 11 million customers along the Eastern Seaboard, or approximately 25 percent of the nation's interstate gas customers. AGD member companies rely almost exclusively on interstate pipeline companies for pipeline gas supplies. As the principal pipelines supplying gas to the East Coast have sharply curtailed deliveries, beginning about 1970, AGD member companies have experienced increasing difficulty in providing adequate and reliable service to their customers, as required by various state laws governing utilities.

Since AGD companies depend heavily on gas supplies available to the interstate market, they are deeply concerned that the decision of the Court of Appeals will result in a lack of authority on the part of the Federal Energy Regulatory Commission (F.E.R.C. or the Commission) to prescribe or enforce delivery obligations for those producers which supply gas to the interstate gas system. AGD member companies will be adversely and directly affected if the decision of the Court of Appeals is upheld. Accordingly, AGD submits the present brief amicus curiae in support of petitioners.

Consent of the Parties

The written consent of the other parties has been obtained for the filing of this brief and is attached to the original, signed copy hereof.

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[1]The members of Associated Gas Distributors are listed on the inside cover of this brief.

ARGUMENT

I. The Court of Appeals' Decision Would Render the Commission Powerless to Protect the Consumer's Interest in An Assured Supply of Gas.

The issue before the Court is whether the Natural Gas Act confers on the Commission *any* power to prescribe or enforce the delivery standards under which the certificates or licenses issued to gas producer-sellers are to be exercised. The Court of Appeals struck down F.P.C. Order No. 539-B not because it was an unreasonable form of otherwise lawful producer certificate regulation. Nor did the Court below hold that the "prudent operator" standard of producer performance was arbitrary or that some other standard should have been considered. The Court ruled instead that the Commission was barred by the Section 1(b) "production or gathering" exemption[2] from adopting Order No. 539-B.[3] The specific terms of Order No. 539-B were apparently irrelevant to the Court of Appeals' decision. The holding below stands for the broad rule that the Commission is powerless to impose *any* performance or delivery standard which touches or impinges on the certificate holder's production function.

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[2]Natural Gas Act, 52 Stat. 821, 15 U.S.C. § 717(b). This Section provides, in pertinent part,

> The provisions of this act . . . shall not apply to . . . the production or gathering of natural gas.

[3]The Court of Appeals' opinion is addressed exclusively to the question of whether Order No. 539-B "is within the jurisdiction of the FERC" and holds that this order would "encroach on areas reserved to the states." *See FERC v. Shell Oil Co., et al.*, 566 F.2d 536, 540 (5th Cir. 1978).

A rule of such breadth strikes at the heart of the Commission's role as the agency responsible for the maintenance of adequate gas service to the interstate market.[4] In the course of discharging its initial licensing authority under Section 7 of the Natural Gas Act, the Commission annually issues hundreds of producer certificates authorizing the sale of gas at the wellhead, to the several interstate pipelines.[5] These producer certificates have come to represent the legal and factual basis on which the nation's huge pipeline and distribution network is licensed, financed and operated.[6] The millions of gas consumers served by the interstate gas system depend upon the integrity of these producer certificates for their daily energy supply. The economic stability of the interstate gas transmission and distribution industry depends on the producers' diligent and faithful performance of those wellhead sales contracts licensed by the Commission. In short, the service undertaken by a producer upon its acceptance of a sales certificate is one in which the *public* has a vital interest.

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[4] *See Atlantic Refining Co.* v. *Public Service Comm'n.*, 360 U.S. 378, 388 (1959); *FPC* v. *Transcontinental Gas Pipeline Corp.*, 364 U.S. 1, 19-20 (1961), and *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972).

[5] *See* Federal Power Commission, 1976 Annual Report to Congress, January 4, 1977, p. 21.

[6] *See*, for example, 18 C.F.R. § 157.14(a)(10) and 18 C.F.R. § 260.7 requiring pipelines seeking authority to construct new facilities to present in support thereof extensive gas supply evidence, including contracts with gas producer-sellers.

The Commission's ability to prescribe and enforce general rules affecting or defining the producer-licensees' obligation to produce is essential to meaningful regulation of this public service. A certificate holder's role as a licensed *seller* of gas at the wellhead cannot be viewed in a vacuum, separate and apart from that party's role as a *producer* of gas. In the real world, the acts of producing and selling gas at the wellhead occur simultaneously and are performed by the same party. The quantity of gas sold is necessarily determined by the quantity of gas produced and vice versa. If the Commission is to regulate the *service* it is authorized to license, *i.e.*, the sale of gas at the wellhead, it can only do so by regulating to some extent or in some way the licensee's production activities. Conversely, if the Commission is by statute precluded from any scrutiny of its licensees' production activities, its ability to administer the Natural Gas Act in the public interest will be seriously hampered.[7]

The need for the Commission to exercise its regulatory power over the producer's service has become acute only in recent years. Since about 1970, there has been a general decline in the level of natural gas supply

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[7] The Court of Appeals' decision implies that the Commission's jurisdiction over producer-sellers' activities extends merely to the initiation of an interstate sale, for which a Section 7(c) certificate is required by *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), and to the termination or abandonment of service, for which a Section 7(b) certificate is required by *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960). What it ignores is the numerous instances between these two jurisdictional incidents when the Commission, sometimes at the producer-licensee's initiative, asserts jurisdiction over various aspects of the *production* function. *See MacDonald* v. *FPC*, 505 F.2d 355 (D.C. Cir. 1974).

available from regulated interstate gas pipelines.[8] Until this era of general and steadily increasing gas shortages, regulations to assure the maintenance of adequate service by companies licensed to sell gas at the wellhead were largely unnecessary. But in a climate of general shortage, the Commission would have been remiss if it had not exercised its authority to clarify and define the service obligations of those holding and acquiring licenses to deliver gas from producing reservoirs to the interstate market. Such regulation is not only timely but is essential to mitigate the public injury wrought by the gas shortage.

II. The Rule Adopted By the Court of Appeals Would Have Adverse Consequences For the Gas Consumer Beyond the Facts of This Case

The importance of this proceeding is not limited to the situation here, where the Commission promulgated a general interpretive rule to be applied in regulating and enforcing the delivery performance of licensed gas producer-sellers. At issue here is the Commission's ability to enforce or regulate its licensees' obligations to produce natural gas, regardless of the origin or source of that obligation. If the "production or gathering" exemption is as broad as the Court of Appeals regarded it, the Commission would be legally barred from *any* attempt to regulate effectively the wellhead sellers' service to the public.

An example of the broad purport of the Court of Appeals ruling is provided by considering the Commission's power to enforce a *contractual obligation* under which a producer-licensee agrees to observe

[8] *See* 1976 Federal Power Commission Annual Report to Congress, *op. cit.*, p. 16.

certain production or delivery standards. In the ordinary discharge of its duties, the Commission issues certificates to producing companies with respect to each individual new sale of gas from each new producing field or lease. The applications for these certificates are required to be accompanied by a copy of the executed gas sales contract whereby the producer-seller typically conveys gas at the wellhead to the interstate pipeline-transporter.[9] The typical gas sales contract submitted to the Commission contains provisions defining the seller's obligation to maintain deliveries of gas. In practice, these provisions vary widely from case to case. In some instances, the producer retains sole *discretion* to operate the lease, drill new wells, rework existing wells, etc. and do whatever it determines is appropriate to provide gas to the purchaser. In other instances, the producer agrees to supply a daily quantity of gas which represents a particular fraction of the total volume of gas reserves remaining in the reservoirs or under the acreage dedicated to the purchaser. In the latter situation, it is not unusual for the contract to provide for a periodic gas reserve determination to be made. Typically, these reserve determinations, *from which the producers' delivery obligation is derived,* are required to be made and agreed upon by both the seller and the buyer. In such a contract, the seller does *not* have sole discretion to produce or maintain deliveries at whatever level the producer finds appropriate; instead, the producer-seller is bound to manage its producing and drilling activity so that the required volume of gas deliveries is maintained.

[9] *See* 18 C.F.R. § 157.25.

When the Commission issues a producer certificate authorizing the commencement of service to an interstate pipeline, it consistently and routinely includes as part of its final certificate order a condition stating that the gas sales contract filed by the producer will be accepted as a "rate schedule" which becomes part of the Commission's official files.[10] In other words, when the Commission issues a certificate, it does so with reference to a particular contract which then becomes a part of the public record insofar as that producer-seller's ongoing service is concerned.

The facts described above present the context in which the sweeping effect of the Court of Appeals' decision may be seen. As indicated, the Commission in this situation certificates or licenses the producer's gas sales contract, *including* the producer's obligation to deliver gas at a defined level or volume. As the agency which has properly asserted its licensing jurisdiction over this contract, and which has an obligation to maintain adequate service to the public, it is reasonable to conclude or infer that the Commission is the forum in which the producer's delivery obligation can be enforced. Indeed, it would appear that the doctrine of primary jurisdiction would apply to any such enforcement action.[11]

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[10] *See*, for example, *Kerr-McGee Corp.*, 46 FPC 1113 (1971).

[11] *See Ashland Oil & Refining Co.* v. *FPC*, 421 F.2d 17 (6th Cir. 1970).

But the Court of Appeals' decision effectively bars any such enforcement action at the Commission *if the relief sought affects or impinges upon the seller-licensee's production activities.* It is conceivable, in the example provided above, that a pipeline could conclude that its producer-supplier was not delivering the daily volume required by its contract and that legal action was necessary to require the producer to do so. It is also conceivable that the cause of the producer's delivery deficiency was its failure to rework or maintain existing wells. The decision below, however, holds that the Commission would be barred from considering the pipeline's complaint or enforcement action in such a situation. This is true because, in the case presented, the remedy sought is addressed to the seller-licensee's *production activity, i.e.,* to the phase of its operations which the court has found beyond the Commission's reach. If the pipeline is unable to invoke the Commission's jurisdiction to enforce the delivery terms of contracts licensed by the Commission, *a fortiori* the Commission could not *sua sponte* initiate a proceeding of this kind, nor could a pipeline's customers do so.

The foregoing illustration demonstrates the policy dilemma thrust on the Commission by the Court of Appeals' decision. On the one hand, the Commission's mandate is to assure an adequate and reliable supply of gas to the nation's consumers. On the other, its power to pursue that objective is undermined and effectively cut off by the broad interpretation of the "production or gathering" exemption as applied to the service being rendered by licensees under outstanding Commission certificate orders.

The resolution of this dilemma is the task of this Court. In approaching that task, it should be recalled that

> "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred."[12]

The "production or gathering" exemption, as broadly interpreted and applied by the Court of Appeals, stands squarely in the path of the Commission's effort to enforce producers' certificated contract obligations and thereby mitigate the public injury resulting from a generalized shortage of gas. To uphold the Commission's jurisdiction to take the action embodied in its Order No. 539-B would be to recognize again that the Natural Gas Act is "a comprehensive and effective regulatory scheme" under which the protection of the public interest is the primary value.

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[12] *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968).

CONCLUSION

The decision of the Court of Appeals is erroneous. If allowed to stand, it will significantly impair the effective administration of the Natural Gas Act. For the reasons stated above, we respectfully request the Court to reverse the decision below.

Respectfully submitted,

FREDERICK MORING
Counsel for Amicus Curiae

Of Counsel:

Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-5800

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 1978, copies of the foregong Brief Amicus Curiae On Behalf of Associated Gas Distributors In Support Of Petitioners were mailed, postage prepaid, to counsel for all parties of record.

FREDERICK MORING

1100 Connecticut Avenue, NW
Washington, DC 20036

Counsel for Amicus Curiae